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82-1844

No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE CENTRAL NATIONAL BANK
OF POTEAU, OKLAHOMA,
Petitioner,

vs.

COAL WASHER RENTAL CORPORATION,
a Pennsylvania Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1983

QUESTIONS PRESENTED

1. Whether the District Court's action in changing jury instructions after closing arguments, complies with requirements of due process.

2. Whether the Court of Appeals correctly determined that evidence related to issues other than misrepresentation authorized "implicit amendment" of the pleadings.

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed, except Bob Thompson, individually, and Bob Thompson Enterprises.[1]

[1] There are no related entities.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 1

PROVISIONS OF LAW INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT:

I. The Judicial Action Below, Changing Jury Instructions After Closing Arguments of Counsel, Based On Implied Consent, Fosters Serious Problems in the Orderly and Fair Administration of the Federal Judicial System 6

II. The Opinion Below Erroneously Holds that Evidence Related to Issues Other Than Misrepresentation Authorized the District Court's "Implicit Amendment" of the Pleadings Based on Implied Consent 8

CONCLUSION 10

CERTIFICATE OF SERVICE follows Petition.

APPENDIX A:
Opinion (Unpublished) of U. S. Court of Appeals for the Tenth Circuit on appeal from the U. S. District Court for the Eastern District of Oklahoma, filed January 20, 1983.

APPENDIX B:
Escrow Agreement between the Buyer, Seller, and Escrow Agent.

TABLE OF AUTHORITIES

Cases	PAGE(S)
Bradshaw v. *Thompson*, 454 F.2d 75 (6th Cir. 1972), *cert. denied* 409 U.S. 878	6
D. H. Overmyer Co. v. *Frick Co.*, 405 U.S. 174 (1972)	7
Delano v. *Kitch*, 542 F.2d 550 (10th Cir. 1976)	6
Ellis v. *Arkansas Louisiana Gas Co.*, 609 F.2d 436 (10th Cir. 1979), *cert. denied* 445 U.S. 964	7
Fuentes v. *Shevin*, 407 U.S. 67 (1972)	9
Hardin v. *Manitowoc-Forsythe Corp.*, 691 F.2d 449 (10th Cir. 1982)	8
Kuhn v. *Civil Aeronautics Board*, 183 F.2d 839 (D.C. Cir. 1950)	6
Lindsey v. *Normet*, 405 U.S. 56 (1972)	7
Mathews v. *Eldridge*, 424 U.S. 319 (1976)	7
Zenith Radio Corp. v. *Hazeltine Research*, 401 U.S. 321, (1971), *reh. denied* 401 U.S. 1015	9
United States Constitution	
Amendment V	2
Federal Rules of Civil Procedure	
Rule 15(b)	2, 5, 8, 9
Rule 51	3
Miscellaneous	
6 Wright & Miller, Federal Practice and Procedure, Civil §1491	6
J. Moore, 3 Moore's Federal Practice, ¶15.13[2]	8

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OPINION BELOW

The opinion of the Court of Appeals was not published, but appears in Appendix A hereto. There was no opinion or order issued by the United States District Court for the Eastern District of Oklahoma regarding the matters asserted in the Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on January 20, 1983. A timely Petition for Rehearing and Suggestion for Rehearing en Banc was denied on April 7, 1983, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

PROVISIONS OF LAW INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

Federal Rules of Civil Procedure:

Rule 15. Amended and Supplemental Pleadings.

(b) Amendments to Conform to the Evidence:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Rule 51. Instructions to Jury: Objection.

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

STATEMENT OF THE CASE

Respondent, Coal Washer Rental Corporation, entered into an Agreement whereby the Respondent was to sell to Bob Thompson a wet-wash coal plant. Thereafter, the parties requested Petitioner, The Central National Bank, to serve as the escrow agent through which payments for the plant would be made. An escrow agreement to that effect was executed by all parties on February 4, 1980. The agreement is set out in Appendix B.

The escrow agreement stated that the purchase price of $670,000.00 was that date deposited by Thompson with the Bank as escrow agent and would be paid to Respondent in three installments. The escrow account was not, however, funded. The escrow agreement also required that payments be made according to the terms of the agreement, unless otherwise agreed in writing by the parties.

On February 20, 1980, Thompson paid the Respondent the first installment of $200,000.00 in cash. On March 26, 1980, Thompson and a representative of Respondent met for delivery of the second installment in the amount of $300,000.00. The funds, supposedly contained in a yellow trash bag, disappeared from the vehicle in which Thompson and the Respondent's representative were riding.

Respondent wrote a demand letter to the Petitioner, and sought payment of $470,000.00, which was comprised of the $300,000.00 installment and the final installment of $170,000.00. Respondent then filed suit against Petitioner and Thompson in the United States District Court for the Eastern District of Oklahoma for breach of the escrow agreement and for fraud. The Respondent's complaint was subsequently amended to delete the allegation of fraud against the Bank. The basis for federal jurisdiction was diversity of citizenship, pursuant to 28 U.S.C. §1332.

During trial, the parties presented evidence concerning conversations among the parties at the time the escrow agreement was signed. As part of that evidence, there was conflicting testimony regarding whether Respondent had been informed that the $670,000.00 had not been placed in escrow with the Bank.

Throughout the trial proceedings, and even after the parties had rested, Respondent's counsel declared repeatedly that Respondent was not asserting fraud or misrepresentation as to the Bank. Respondent proceeded on the issue of whether the Petitioner was obligated to insure that Thompson funded the escrow agreement. On October 21, 1980, after the evidence had been submitted, the District

Court reviewed its proposed jury instructions with all counsel, who approved of the instructions.

The following day, October 22, 1980, counsel made closing arguments. After completion of the arguments, the District Court called counsel into chambers and announced its intention to give an instruction on misrepresentation. Petitioner's counsel objected that the instruction injected the issue of fraud, which had not been pleaded. The District Court overruled the objection, gave the instruction and submitted the case to the jury. The jury subsequently returned a verdict for Respondent in the amount of $470,000.00. On appeal, Respondent's counsel continued to assert that there was no contention that the Bank was party to a fraud (Answer Brief, p. 30).

On appeal, the Court of Appeals for the Tenth Circuit affirmed, holding, *inter alia*, that the fraud or misrepresentation issue was tried by implied consent and that the District Court's action constituted an implicit amendment to the pleadings, pursuant to Rule 15(b), Federal Rules of Civil Procedure. A timely Petition for Rehearing and Suggestion for Rehearing en banc was denied by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

THE JUDICIAL ACTION BELOW, CHANGING JURY INSTRUCTIONS AFTER CLOSING ARGUMENT OF COUNSEL, BASED ON IMPLIED CONSENT, FOSTERS SERIOUS PROBLEMS IN THE ORDERLY AND FAIR ADMINISTRATION OF THE FEDERAL JUDICIAL SYSTEM.

The District Court, on its own initiative, presented to counsel an instruction which posed to the jury an issue which none of the parties had asserted. Because of the timing of the court's instruction, occurring after all closing arguments had been made, counsel was not effectively or specifically informed of the content of the instructions the court intended to give, which was necessary in order to enable counsel to argue the case intelligently, *see Delano* v. *Kitch*, 542 F.2d 550 (10th Cir. 1976). The injection of the issue of misrepresentation or fraud after the close of evidence and after argument had been heard constituted material prejudice, as counsel would have otherwise presented relevant evidence and argument, *see Bradshaw* v. *Thompson*, 454 F.2d 75 (6th Cir. 1972) *cert. denied* 409 U.S. 878.

Counsel's objection to the post-argument change in instructions precluded the issue of misrepresentation being tried by implied consent. Without earlier, actual notice of the issue, prohibited surprise or lack of due process resulted, *see Kuhn* v. *Civil Aeronautics Board*, 183 F.2d 839 (D.C. Cir. 1950); 6 Wright & Miller, Federal Practice and Procedure, Civil §1491. Before consent could be found, the Bank's consent, like any other waiver, must have been

given voluntarily, intelligently, and with awareness of the legal consequences, *see D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174 (1972). Without notice of the issue and opportunity to present relevant evidence, there could not be such a waiver or implied consent.

Testimony relating to what the parties said to one another at the time of execution of the escrow agreement was evidence relevant to other issues presented and did not constitute implied consent of Petitioner or its counsel to trial on matters outside the pleadings. *Ellis* v. *Arkansas Louisiana Gas Co.*, 609 F.2d 436 (10th Cir. 1979), *cert. denied* 445 U.S. 964.

The action of the District Court was not an implicit amendment of the pleadings, but was the addition of a new issue as to which Petitioner did not have a fair opportunity to defend through additional evidence or argument. Absent the requisite notice and opportunity to defend at a meaningful time and in a meaningful manner, Petitioner was not afforded due process, *Lindsey* v. *Normet*, 405 U.S. 56 (1972); *see Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

II.

THE OPINION BELOW ERRONEOUSLY HOLDS THAT EVIDENCE RELATED TO ISSUES OTHER THAN MISREPRESENTATION AUTHORIZED THE DISTRICT COURT'S "IMPLICIT AMENDMENT" OF THE PLEADINGS BASED ON IMPLIED CONSENT.

In its opinion, the Court of Appeals recognized that an amendment under Rule 15(b) may not be based on an issue tried inadvertently, and that the parties must have understood the evidence to be aimed at the unpleaded issue, citing its own prior decisions and J. Moore, 3 Moore's Federal Practice, ¶15.13[2]. Nonetheless, the Court of Appeals concluded that the fact that Respondent claimed that the Bank was liable, and that there were discussions by the court and counsel of whether Plaintiff proceeded in tort or contract, sufficiently disclosed the theory of misrepresentation.

Cross-examination and other evidence bearing on whether Respondent was informed that the escrow account was not funded, did not constitute notice of or consent to submission of the issue of misrepresentation. There was no indication that the testimony deemed by the Court of Appeals to constitute implied consent was intended to relate to misrepresentation. In *Hardin* v. *Manitowoc-Forsythe Corp.*, 691 F.2d 440 (10th Cir. 1982), the court stated:

> "When the evidence claimed to show that an issue was tried by consent is relevant to an issue already in the case, and there is no indication that the party presenting the evidence intended thereby to raise a new issue, amendment may be denied in the discretion of the trial court." (citations omitted)

In this instance, there was a failure to recognize that the issue called for the exercise of discretion, rather than being determined by the act and approval of "implicit amendment." Neither the District Court nor the Court of Appeals evaluated the prejudice to Petitioner, Rule 15(b); and *see Zenith Radio Corp.* v. *Hazeltine Research,* 401 U.S. 321, 330-331 (1971), *reh. denied* 401 U.S. 1015.

The "implicit amendment" ruling of the Court of Appeals was a post-hoc rationalization in order to uphold a verdict without regard to the timeliness and seriousness of the issue injected by that "implicit amendment". This disregard by the appellate court has resulted in the denial of fair and impartial judicial processes to Petitioner. Fundamental fairness and procedural due process rules are applicable to processes of the judiciary, *see Fuentes* v. *Shevin,* 407 U.S. 67 (1972).

The opinion of the Court of Appeals for the Tenth Circuit runs counter to its own prior holdings, and constitutes a departure from the accepted and usual course of judicial proceedings. It has also sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Petitioner therefore respectfully suggests that the instant case is appropriate for review by this Court, and that a Writ of Certiorari should be granted to review the opinion rendered below.[2]

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[2] Should the Court grant the Writ, Petitioner desires to submit as subsidiary, additional questions whether the misrepresentation instruction was erroneous, and whether the uncontroverted payments outside the escrow constitute, as a matter of law, a waiver or estoppel against the Respondent.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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May, 1983

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition for Writ of Certiorari were mailed with first-class postage prepaid to each of the attorneys for Respondents, namely Burton J. Johnson, *Esq.* and Chris J. Collins, *Esq.*, of LOONEY, NICHOLS, JOHNSON & HAYES, 528 Northwest 12th Street, Oklahoma City, Okla. 73103, this ..... day of ....., 1983.

All parties required to be served have been served.

.....

James D. Fellers

APPENDIX A

NOT FOR ROUTINE PUBLICATION

[Filed January 20, 1983]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

COAL WASHER RENTAL CORPORATION, a Pennsylvania corporation, Plaintiff-Appellee	)	
v.	)	No. 81-1146
	)	81-1154
BOB THOMPSON, individually, and BOB THOMPSON ENTERPRISES and THE CENTRAL NATIONAL BANK OF POTEAU, OKLAHOMA Defendants-Appellants.	)	

Appeal from the United States District Court
for the Eastern District of Oklahoma
(D.C. No. 80-164-C)

Joe R. Kennedy of Kennedy, Kennedy, Wright & Stout, Muskogee, Oklahoma, for Defendant-Appellant The Central National Bank of Poteau, Oklahoma; and Whit Pate on the brief for Defendant-Appellant Bob Thompson.

Chris J. Collins (Burton J. Johnson with him on the brief) of Looney, Nichols, Johnson & Hayes, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before McWILLIAMS, BARRETT and SEYMOUR, Circuit Judges.

[APPENDIX]

SEYMOUR, Circuit Judge.

Plaintiff Coal Washer Rental (CWR) brought this diversity action against defendants Bob Thompson and the Central National Bank of Poteau (Bank). CWR sought recovery of money pursuant to an escrow/purchase agreement for the sale of a coal washer by CWR to Thompson. The agreement stated that the purchase price of $670,000 was on deposit with the Bank as escrow agent and would be paid to CWR in three installments. The jury returned a verdict in favor of CWR by answers to special interrogatories, and the court entered judgment for CWR in the amount of $470,000, the sum of the second and third installments due under the agreement. Thompson and the Bank appeal. We affirm.

I.
BACKGROUND

The extraordinary facts giving rise to this lawsuit, viewed most favorably to the jury verdict, are as follows. The president of CWR, Ben Weerts, is a Belgian who speaks somewhat broken English. Weerts and Thompson agreed upon the sale and assembly of a coal washer, a large piece of equipment which enhances the value of coal by removing sulphur and ash. Thompson was in the business of buying and selling coal and wanted the coal washer installed as part of his operation on the Arkansas River in Van Buren, Arkansas.

After preliminary negotiations between Thompson and Weerts' salesman, Haywood Clack, Weerts met with Thompson in Thompson's office in Poteau, Oklahoma, on February 4, 1980. Thompson presented Weerts with a document labeled "Escrow Agreement" and told Weerts that a copy signed by Thompson and Tommy Miller, president of the Bank, would be mailed to Weerts. However, Weerts insisted on seeing Miller sign the agreement, so he and Thompson went to Miller's office at the Bank.

The evidence of what took place in Miller's office is conflicting. Weerts testified that both Thompson and Miller had assured him that the money was on deposit in the Bank as stated in the agreement.[1] However, Miller testified that he had told Weerts the money was not in the Bank, and that Thompson had stated the escrow agreement was merely a formality. Thompson did not testify. Miller, Thompson, and Weerts signed the agreement, and Weerts retained a copy.

The first payment required by the agreement was made on February 20, 1980, in Thompson's office in Poteau. Thompson gave Weerts $200,000 in cash. Weerts signed a receipt and promptly returned to Van Buren to deposit the money in a bank. The second installment was due under the agreement when all the equipment necessary to assemble the coal washer had been delivered to the plant site in Van Buren. On March 25, 1980, the day before the remaining parts were to be delivered to the plant site, Weerts

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[1]The escrow agreement provides in pertinent part:

"Bob Thompson agrees to pay for such labor and equipment in the following manner, and to evidence his intentions has this date deposited with The Central National Bank of Poteau, Oklahoma, as escrow agent, the total sum of $670,000.00 to be held by the said The Central National Bank of Poteau, Oklahoma, with instructions for such sums to be paid to the seller as follows:

$200,000.00 when seller furnishes evidence that such Wet Wash Plant has been delivered to the United States and has been unloaded from the ship and is ready for further delivery to Van Buren, Ark.

$300,000.00 additional when seller furnishes evidence that all of the equipment for such Wet Wash plant has been delivered to the construction site at Van Buren, Arkansas where such equipment will be put together.

The final $170,000.00 to be paid when the Wet Wash Plant has been assembled by the seller and has been successfully tested to show that it is in proper working condition."

Rec., vol. II, at 1.

requested the second payment from Thompson. On the following day, Weerts met Thompson at the job site at about eleven o'clock in the morning. Thompson then suggested that he and Weerts go in his truck to pick up the two pumps which were the last pieces of equipment to be delivered to the plant site. Weerts had originally arranged to have his mechanic pick them up. When Weerts got into Thompson's truck, Thompson indicated a yellow trash bag on the seat and told Weerts that the bag contained the second payment. Thompson opened the bag briefly, and Weerts saw what he assumed were bundles of money.

About half a mile from the job site, Thompson stopped at a small restaurant to make a phone call. They locked the truck and went into the restaurant. Weerts went to the restroom while Thompson made the phone call, and then Thompson suggested that they have a sandwich since it was almost lunchtime. While they were eating, Thompson asked Weerts to sign a receipt for the second payment. At Thompson's insistence Weerts signed the receipt but conditioned his signature upon his counting the money after their return to the job site. When they went out to the truck after lunch, the truck was unlocked and the money was gone. Weerts wanted to call the police immediately, but Thompson insisted on returning to his office at the job site. Once back at the office, Weerts again urged Thompson to call the police. However, Thompson wanted to call the sheriff of Poteau. Finally, the Van Buren authorities were notified about an hour after the theft was discovered. The police investigation showed that the truck had not been broken into, and the police arranged for both Weerts and Thompson to take a polygraph test on Tuesday, April 1. Weerts continued to assemble the coal washer from the time of the theft up to the date the polygraph was to be given.

Weerts arrived to take the polygraph test, but Thompson did not appear. A letter was delivered from Thompson's office stating that he was refusing to take the test on

advice of his attorney, due to a pending IRS investigation into his affairs. Because of Thompson's refusal, Weerts immediately stopped work on the plant. Weerts received a letter from Thompson dated April 7, 1980, stating that since Weerts had abandoned the project, Thompson had made other arrangements to complete the coal washer and that Thompson expected CWR to bear the expense involved. Testimony indicated that the plant was substantially completed when Weerts left the project on April 1.

On April 11, an attorney retained by Weerts wrote a letter to Miller as escrow agent, demanding payment of the $470,000 remaining unpaid and due under the agreement. When the Bank did not respond, CWR filed this lawsuit against Thompson and the Bank. In the original complaint, CWR pleaded a cause of action against both defendants for breach of the escrow contract and a second cause of action against both defendants for fraud. The complaint was subsequently amended to delete the allegation of fraud against the Bank. The parties stipulated prior to trial that no money had been deposited in the Bank as required by the agreement.

Trial was to a jury. Following presentation of plaintiff's case, the Bank moved for a directed verdict on the ground that no valid escrow agreement existed because no money had been placed in escrow. Alternatively the Bank argued that if a valid escrow had been created, CWR had waived its right to enforce the terms of the escrow by accepting a cash payment outside the agreement. The court pointed out that evidence had been presented demonstrating that the Bank had told Weerts the money was in fact on deposit with the Bank for the purpose of fulfilling the escrow agreement. The judge and the attorneys for CWR and the Bank discussed what theory of liability CWR was seeking to assert and whether that theory had been set out in the pleadings. The court withheld ruling on the Bank's motion in order to permit the attorney for CWR to research the law on escrow.

After all the evidence was in, the parties and the court again discussed what theory of liability supported recovery from the Bank. The court ultimately proposed a special interrogatory asking the jury to determine whether the Bank had represented to Weerts that it held money for the purpose of making payments under the agreement. Counsel for the Bank agreed to submit this question to the jury along with the issue of whether CWR was estopped from enforcing the escrow agreement because Weerts accepted the first payment directly from Thompson rather than under the terms of the escrow.

In closing argument, counsel for the Bank told the jury that it must determine whether CWR had relied on a statement by the Bank that the money was on deposit. However, when the court proposed a jury instruction on the issue of the Bank's representation, the Bank objected on the ground that the instruction injected the issue of fraud into the suit when it had not been pleaded.

II.
THE BANK'S APPEAL

On appeal the Bank contends that the trial court erred in failing to grant its motion for directed verdict, and in instructing the jury on an issue that was not properly in the case.

The Bank contends a directed verdict should have been granted because funding the escrow is a legal prerequisite to a valid escrow agreement. The court instructed the jury that if the money had not been deposited with the Bank, no valid escrow existed and "no rights or liabilities are created or may be enforced in regard to the purported escrow." Rec., vol. V, at 443. This instruction, coupled with the stipulation that no money had in fact been deposited in the Bank, in effect directed the jury that CWR could not recover on the escrow agreement unless it found that the bank represented that the money was in the account,

or unless Weerts waived any of his rights or was estopped from asserting them. The Bank also argues that the issues of waiver and estoppel should have been decided against CWR as a matter of law. We disagree. The issues of waiver and estoppel on this record were clearly questions of fact for the jury. *See Crowell* v. *Thoreau Center,* 631 P.2d 751 (Okla. 1981).

Accordingly, the only issue raised by the Bank which we must consider is whether the trial court properly instructed the jury that the Bank was bound if it made a material representation relied on by CWR. The Bank contends this instruction should not have been given because it raised an issue which CWR had not pleaded and which was not set out in the pretrial order.[2] CWR argues that the court properly gave the instruction under Rule 15(b) of the Federal Rules of Civil Procedure because the issue had been tried by implied consent. Rule 15(b) provides:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the

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[2]Although the pretrial order did not use the word "fraud," plaintiff's contentions included allegations that the Bank was liable to plaintiff for the $470,000. In response, the defendants' contentions included the Bank's assertion "that the bank's agent, Mr. Miller, told all parties that the money was not there at the time the escrow agreement was signed, and would not be on deposit in escrow unless requested." Rec., vol. I, at 45. Thus, whether Miller represented that the money was in the escrow account was recognized by the parties as a prime issue in the case.

> pleadings to be amended and shall do so freely when presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Fed. R. Civ. P. 15(b).

Rule 15(b) thus anticipates two situations in which issues not raised by the pleadings may properly be resolved at trial: when the parties develop evidence on the issue without objection; and when the court permits trial of the issue notwithstanding an objection that the issue is outside the pleadings. *Hardin* v. *Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456-57, (10th Cir. 1982). "The test of consent is whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment." *Id.* at 456; *see R. A. Pohl Construction Co.* v. *Marshall*, 640 F.2d 266, 267 (10th Cir. 1981). Where there is an objection to the admission of new matter, as in this case, the objecting party must show actual prejudice. *See Hardin*, 691 F.2d at 457.

Both CWR and the Bank presented evidence without objection on whether Miller, the Bank president, had told Weerts that the money was not on deposit (despite Miller's signature on an escrow agreement which stated that the money was in the Bank). The Bank thoroughly explored the representation issue in its case in chief and in its cross-examination of CWR's witnesses. Moreover, the Bank agreed to a special jury interrogatory requiring the jury to determine whether "the defendant bank represented to Mr. Weerts that it held money for payment of the amounts set forth in the escrow agreement." Rec., vol. I, at 83. Nonetheless, when the court proposed to instruct the jury on the law applicable to this determination, the Bank ob-

jected on the ground that the issue was outside the pleadings.

The Bank did not request the opportunity to reopen its case when the court overruled its objection to the proposed instruction. Considering all the circumstances, we believe the giving of the instruction did not result in prejudice to the Bank.[3] *See Ward* v. *H. B. Zachry Construction Co.*, 570 F.2d 892, 897-98 (10th Cir. 1978). We conclude that to the extent the trial court's action constituted an implicit amendment to the pleadings, it was authorized under Rule 15(b). *See Hardin*, 691 F.2d at 457.

III.
THOMPSON'S APPEAL

Prior to trial, Thompson's attorney made a motion in limine to suppress evidence that Thompson had refused to take the polygraph test. This motion was denied and several references to Thompson's failure to take the test were made during trial. Thompson's only allegation on appeal is that the trial court committed reversible error in admitting evidence that he had refused to take a polygraph test.

This court has recently reiterated its holding that the *results* of a polygraph test are inadmissible in a criminal trial. *United States* v. *Hunter*, 672 F.2d 815, 817 (10th Cir.

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[3]We likewise find no merit in the Bank's belated contention that it was unaware the question of misrepresentation was an issue in the trial until the instruction was proposed. We agree that amendment under Rule 15(b) may not be based on an issue tried inadvertently, and that the parties must have understood the evidence to be aimed at the unpleaded issue. *See* 3 J. Moore, Moore's Federal Practice ¶ 15.13[2], at 15-175 n.28 (2d ed. 1982). The record in this case contains several discussions among the parties and the court concerning the nature of CWR's representation theory before and after the defense put on its case. Although the parties and the court disagreed over whether the theory sounded in tort or in contract, everyone understood that the gravamen of the theory was misrepresentation.

1982). Moreover, we recognize that a party's *refusal* to take a polygraph examination has been held inadmissible in both criminal and civil contexts. *See United States* v. *Cardarella*, 570 F.2d 264, 266-67 (8th Cir.), *cert. denied*, 435 U.S. 997 (1978); *Aetna Insurance Co.* v. *Barnett Brothers*, 289 F.2d 30, 34 (8th Cir. 1961).

Under the particular facts of this case, however, we conclude that admission of the evidence does not constitute reversible error. In his answer to CWR's complaint, Thompson alleged that three days after the theft of the $300,000 from the truck "plaintiff called its workmen off the project which necessitated [Thompson] expending some $90,000.00 in order to finish the plant and get it into production." Rec., vol. I, at 24. Thompson asserted this $90,000 as a set-off against any amount he might be found to owe CWR. Thompson thus raised the issue of whether CWR breached the contract by walking off, thereby giving Thompson the right to set off the resulting damages against his liability. Weert testified without contradiction that work continued on the plant for the three days between the theft and the date on which the polygraph test was scheduled. Weerts further testified that he stopped work because Thompson refused to take the test. We conclude that the court did not err in thus allowing CWR to defend against Thompson's claimed breach of contract by explaining the circumstances surrounding its decision to walk off the job. A limiting instruction would have been appropriate, but Thompson did not request one.

The judgment is affirmed.

APPENDIX B

ESCROW AGREEMENT

This agreement entered into this the 4th day of February, 1980, by and between Bob Thompson as buyer, Ben Weerts, President of Coal Washer Rental Corp. as seller, and The Central National Bank of Poteau, Oklahoma, as Escrow Agent.

The particulars of the agreement are as follows:

Bob Thompson is purchasing from Ben Weerts and/or Coal Washer Rental Corp. a Wet Wash Plant for the washing and processing of coal. The total purchase price for such Wet Wash Plant, including transportation and installation on the buyer's property at Van Buren, Arkansas, is $670,000.00. The seller agrees to deliver such material and equipment necessary for such plant, together with the proper parties for the proper installation of such plant in a workmanlike manner to such property owned by the buyer at Van Buren, Arkansas, for such amount.

Bob Thompson agrees to pay for such labor and equipment in the following manner, and to evidence his intentions has this date deposited with The Central National Bank of Poteau, Oklahoma, as escrow agent, the total sum of $670,000.00 to be held by the said The Central National Bank of Poteau, Oklahoma, with instructions for such sums to be paid to the seller as follows:

$200,000.00 when seller furnishes evidence that such Wet Wash Plant has been delivered to the United States and has been unloaded from the ship and is ready for further delivery to Van Buren, Arkansas.
$300,000.00 additional when seller furnishes evidence that all of the equipment for such Wet Wash plant has been delivered to the construction site at Van Buren, Arkansas, where such equipment will be put together.

[APPENDIX]

The final $170,000.00 to be paid when the Wet Wash Plant has been assembled by the seller and has been successfully tested to show that it is in proper working condition.

It is further agreed by all of the parties hereto that The Central National Bank of Poteau, Oklahoma is acting as escrow agent only and any payments other than as set out above shall not be made unless agreed to in writing by all of the parties hereto unless so ordered by a Court of competent jurisdiction in the event there is a disagreement which can not be settled by the parties hereto.

Signed at Poteau, Oklahoma, this the 4th day of February, 1980.

Bob Thompson

Ben Weerts, individually and as President of Coal Washer Rental Corp.

The Central National Bank of Poteau, Oklahoma